

Message Text

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COMMERCE FOR (NTIA), NBS, OSTP

E.O. 11652: N/A
TAGS: TGEN, OECD
SUBJECT: MEETING OF DRAFTING PARTY OF OECD EXPERT GROUP ON
TRNS-BORDER DATA BARRIERS AND PROTECTION OF PRIVACY

SUMMARY: DRAFTING PARTY MET IN STOCKHOLM JULY 10-12.
ALTHOUGH MAJORITY OF TIME WAS SPENT ON ANALYSIS, ON
PARAGRAPH BY PARAGRAPH BASIS, OF OECD SECRETARIAT DRAFT
GUIDELINES, US DEL WAS REQUESTED TO PRODUCE AN ALTERNATIVE
DRAFT OUTLINE FOR DISCUSSION PURPOSES REFLECTING WHAT US
THOUGHT SHOULD BE SUBSTANCE AND STRUCTURE OF GUIDELINES.
US DRAFT WAS PRODUCED ON SHORT NOTICE AND CIRCULATED,
ALTHOUGH IT WAS SPECIFIED DRAFT WAS FOR DISCUSSION PUR-
POSES ONLY AND DID NOT NECESSARILY REPRESENT OFFICIAL
VIEWS OF USG. US HAS BEEN REQUESTED TO GIVE OECD BY
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END OF AUGUST A REFINED DRAFT OUTLINE WHICH HAS BEEN
APPROVED IN WASHINGTON. CHAIRMAN EXPRESSED FIRM
SUPPORT FOR GENERAL APPROACH REFLECTED IN US DEL
DRAFT, WHICH HE SAID SEPARATED SOCIAL GOALS OF
PRIVACY PROTECTION FROM MECHANISM FOR ACHIEVING THE
GOALS. ALTHOUGH HE FOUND SOME OF THE OECD DRAFT USE-
FUL, HE CRITICIZED IT FOR CONFUSING PREAMBULAR MATERIAL,

PRINCIPLES, AND MACHINERY. DESPITE OBVIOUS DIFFERENCES IN US AND EUROPEAN APPROACHES AND THE DIRECT CRITICISM BY US DEL OF THE OECD DRAFT, MEETING WAS CONDUCTED IN ATMOSPHERE OF COOPERATION AND WITH A GREAT DEAL OF FIRMNESS BY THE CHAIRMAN. NEXT MEETING OF DRAFTING GROUP HAS BEEN SCHEDULED FOR DECEMBER 7 AND 8, IMMEDIATELY FOLLOWING A MEETING OF THE FULL EXPERT GROUP ON DECEMBER 5 AND 6. END SUMMARY.

1. THE FIRST MEETING OF THE DRAFTING PARTY OF THE EXPERT GROUP ON TRANSBORDER DATA BARRIERS AND PROTECTION OF PRIVACY MET IN STOCKHOLM JULY 10-12, 1978, UNDER THE FIRM CHAIRMANSHIP OF MR. JUSTICE KIRBY OF AUSTRALIA. REPRESENTATIVES FROM ALL OF THE COUNTRIES COMPRISING THE DRAFTING GROUP ATTENDED, AS WELL AS A FINNISH OBSERVER AND SWEDISH REPRESENTATIVES FROM ICCP (MARTIN-LOF) AND COE (CORELL).

2. FIRST ITEM OF BUSINESS AFTER ADOPTION OF AGENDA WAS REPORT BY OECD SECRETARIAT AND MEMBERS OF DRAFTING PARTY ON STATUS OF PRIVACY LAWS IN OECD AREA AND COE ACTION. HIGHLIGHTS OF REPORT ARE AS FOLLOWS:
A. LATEST COE PRIVACY CONVENTION DRAFTING GROUP MEETING MAY 10-12 RESULTED IN AMENDMENTS IN SIGNIFICANT DETAIL TO COE DRAFT. THE LATEST VERSION OF COE DRAFT, ENGLISH VERSION OF WHICH, WILL NOT BE LIMITED OFFICIAL USE

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AVAILABLE UNTIL SOMETIME IN AUGUST, WILL BE USED BY OECD CONSULTANT (DR. PETER SEIPEL) IN PREPARING A DOCUMENT FOR USE OF THE DRAFTING GROUP WHICH WILL COMPARE THE PROVISIONS OF COE DRAFT, A REVISED OECD SECRETARIAT DRAFT TO BE PREPARED BY HIM, AND A DISCUSSION PAPER PREPARED BY US DELEGATION AT CHAIRMAN KIRBY'S REQUEST.

B. BOTH NORWAY AND DENMARK HAVE NOW PASSED PRIVACY LEGISLATION COVERING THE PUBLIC AND PRIVATE SECTIONS AND "LEGAL PERSONS."

C. OECD RECEIVED HIGH-LEVEL DELEGATION (FORMER JUSTICE AND TELECOMMUNICATIONS MINISTERS) FROM JAPAN, WHICH HAS BEEN ONE OF THE COUNTRIES NOT PARTICIPATING IN ANY SIGNIFICANT DEGREE IN TRANSBORDER DATA FLOW WORK UP UNTIL NOW. DELEGATION REPORTED JAPAN WILL NOW SET UP A COMMISSION TO STUDY PRIVACY LEGISLATION AND TRANSBORDER DATA FLOWS.

D. AUSTRIAN PRIVACY LAW WILL BE ENACTED BY MID-OCTOBER 1978 AND WILL HAVE SECTIONS SPECIFICALLY COVERING TRANSBORDER DATA FLOWS. THE AUSTRIAN LAW ALSO SETS UP A DATA INSPECTION BOARD SIMILAR TO SWEDEN'S AND REQUIRES THAT ALL DATA SYSTEMS BE REGISTERED AND

LICENSED.

E. US DEL REPORTED THAT POLICY RECOMMENDATIONS ON PPSC REPORT SHOULD GET FINAL APPROVAL FROM CABINET OFFICERS WITHIN NEXT FEW WEEKS, AFTER WHICH IT WILL BE TRANSMITTED TO THE PRESIDENT. US INDICATED THAT, WHILE MANY OF PPSC RECOMMENDATIONS WILL BE ADOPTED, NO NEW BUREAUCRACY IS CREATED.

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3. NEXT ORDER OF BUSINESS WAS CONSIDERATION OF DRAFT PREPARED FOR OECD SECRETARIAT BY DOCTOR SEIPEL. US DEL STATED FORCEFULLY THAT THE SEIPEL DOCUMENT AS A WHOLE PRESENTS FUNDAMENTAL PROBLEMS FOR THE US, THAT IT DOES NOT STRIKE A MIDDLE GROUND BETWEEN APPROACHES TOWARD PRIVACY PROTECTION ON EACH SIDE OF THE ATLANTIC BUT INSTEAD TAKES ALMOST TOTALLY A EUROPEAN VIEW, AND THAT IT CONFUSES MEANS AND ENDS. US DEL URGED THAT DRAFTING GROUP SHOULD FOCUS FIRST ON THE SUBSTANTIVE PRINCIPLES OF PRIVACY PROTECTION AND, AFTER REACHING AGREEMENT ON THESE, TURN TO THE MORE DIFFICULT QUESTION OF HOW TO HARMONIZE DIFFERING PROCEDURAL APPROACHES TO REACHING THE SOCIAL GOALS ELUCIDATED IN THE PRINCIPLES.

4. AFTER US PRESENTATION, CHAIRMAN ASKED US DEL IF THE LIMITED OFFICIAL USE

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US HAD BROUGHT ANY ALTERNATIVE DRAFT THAT COULD BE USED. HE ADDED THAT PRESENTATION BY US DEL REFLECTED TO A GREAT EXTENT THE VIEWS OF AUSTRALIA AND PROBABLY THE OTHER ANGLO-PHONE COUNTRIES ON DRAFTING GROUP. HE THEREFORE REQUESTED US DEL TO PREPARE AN OUTLINE PAPER FOR PURPOSES OF DISCUSSION DURING REST OF MEETING REFLECTING WHAT US DEL THOUGHT SHOULD BE SUBSTANCE AND STRUCTURE OF THE GUIDELINES. TASK WAS GIVEN TO US DEL BY CHAIRMAN ON AFTERNOON OF JULY 10 AND HE REQUESTED PRODUCT BE TYPED AND AVAILABLE FOR DISTRIBUTION TO REST OF DRAFTING GROUP MORNING OF JULY 11. (SINCE OFFICIAL DINNER WAS HOSTED BY DRAFTING GROUP BY SWEDEN EVENING OF JULY 10, US DEL DRAFTING WAS ACCOMPLISHED BETWEEN 10 P.M. AND 1 A.M. AMIDST THE GLITTERING AND RESPLENDANT SURROUNDINGS OF THE FOYER OF THE GRAND HOTEL). DRAFT WAS PRODUCED BY US DEL WITH CAVEAT THAT IT WAS DRAFTED "AT THE REQUEST OF THE CHAIRMAN ON SHORT NOTICE AS AN AID FOR DISCUSSION AND ANALYSIS AND DOES NOT NECESSARILY REPRESENT THE VIEWS OF THE US GOVERNMENT."

5. DISCUSSION LATER DURING MEETING OF JULY 11 LED TO DECISION TO USE US DEL DRAFT IN OECD COMPARISON PAPER REFERRED TO IN PARA 1. US DEL THEREFORE ASKED FOR AND RECEIVED TIME TO CONSULT IN DRAFT IN WASHINGTON BEFORE IT IS USED. OECD SECRETARIAT HAS STRESSED, HOWEVER, THAT IT WILL NEED TO RECEIVE US DRAFT BY END OF AUGUST TO KEEP TO TIMETABLE OF EXPERT GROUP, AS US DRAFT WILL ALSO BE NECESSARY FOR OECD CONSULTANT SEIPEL, WHO HAS JOB OF PRODUCING A SECOND DRAFT OF HIS PAPER FOR OECD SECRETARIAT. SEIPEL HAS BEEN DIRECTED IN HIS SECOND DRAFT TO TRY TO "MARRY" THE TWO DIVERGENT APPROACHES TOWARD PRIVACY PROTECTION AND LIMITED OFFICIAL USE

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TO RESTRUCTURE HIS PAPER TO ERADICATE THE CONFUSION BETWEEN MEANS AND ENDS REFERRED TO IN SUMMARY.

6. MEMBERS OF DRAFTING GROUP WERE ALSO REQUESTED BY CHAIRMAN TO PROVIDE OECD SECRETARIAT AS QUICKLY AS POSSIBLE COMMENTS IN WRITING ON SEIPEL'S FIRST DRAFT FOR HIS USE IN PREPARING SECOND DRAFT.

7. US DEL HAS MADE CLEAR TO OECD SECRETARIAT AND CHAIRMAN THAT IF DRAFTS CONTINUE TO REFLECT SO TOTALLY THE EUROPEAN MODEL, US MIGHT NOT BE ABLE TO ADHERE TO FINAL DRAFT.

8. AFTER SHORT DISCUSSION IN FAIRLY RANDOM WAY OF VARIOUS IDEAS AND ISSUES, DRAFTING GROUP TURNED TO METHODOLOGICAL PARAGRAPH BY PARAGRAPH CRITIQUE OF SEIPEL DRAFT. THIS CABLE WILL NOT ATTEMPT TO REPORT THE DISCUSSION OF PARAGRAPH BY PARAGRAPH REVIEW OF THE SEIPEL DRAFT, AS IT WOULD BE A VIRTUAL IMPOSSIBILITY. SUFFICE IT TO SAY, US DEAL ARTICULATED FULLY ITS OBJECTIONS TO THE DRAFT.

9. WITH REGARD TO DISCUSSION REFERRED TO ABOVE WHICH TOOK PLACE PRIOR TO REVIEW OF DRAFT, SOME OF COMMENTS OF NOTE WERE AS FOLLOWS:

A. KIRBY, WHILE NOTING THAT HE AND ANGLOPHONES HAD PROBLEMS WITH SEIPEL DRAFT, ALSO INDICATED HE SAW A NEED FOR SOME "REALISM" ON THE US SIDE OF THE ATLANTIC, AND THAT US NEEDS TO CONSIDER IN MORE DETAIL THE PROBLEMS OF RECIPROCITY AND CONFLICT OF LAWS.

B. IT WAS STRESSED THAT TERMS AND LANGUAGE IN OECD GUIDELINES SHOULD BE COORDINATED WITH COE ACTION, SO THAT WE DO NOT WIND UP WITH TWO DIFFERENT NOMENCLATURES.

C. THERE WAS GENERAL AGREEMENT THAT, IN DRAFTING, GROUP SHOULD TAKE ACCOUNT OF FRENCH TRANSLATION OF NAME OF THE EXPERT GROUP, WHICH INVOLVES PROTECTION OF LIMITED OFFICIAL USE

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"INDIVIDUAL LIBERTIES," WHICH IS THOUGHT TO BE A CONCEPT GOING BEYOND "PRIVACY," WHICH ALSO INVOLVES FAIR INFORMATION PRACTICES AND EMBRACES THE IDEA OF THE RELATIONSHIP OF THE INDIVIDUAL TO THE STATE AND SOCIETY.

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D. CHAIRMAN KIRBY CRITICIZED THE US DEL DRAFT PRIVACY PRINCIPLES BECAUSE THEY LACK A "FLOW" PRINCIPLE, I.E., THEY SEEM TO JUMP AROUND EVERY WHICH WAY RATHER THAN LOGICALLY SETTING OUT PRINCIPLES IN TERMS OF COLLECTION OF PERSONAL DATA, USE AND MAINTENANCE OF DATA, AND ITS DISSEMINATION, I.E., "INPUT, THOUGH-PUT, AND OUTPUT." CHAIRMAN KIRBY HAS DIRECTED THAT THE STATEMENT OF PRIVACY PRINCIPLES IN ANY NEW DRAFT WILL FLOW A "FLOW" SYSTEM, AND HE REPEATED HIS CRITIQUE OF US STRUCTURE OF PRINCIPLES AT CLOSE OF MEETING BY STATING THAT THE US SHOULD GIVE THOUGHT NOT TO BE WEDDED TO THE PPSC POSITION, AND TO ORGANIZING ITS EIGHT PRINCIPLES INTO A FLOW SYSTEM. HOWEVER, THE CHAIRMAN ALSO EXPRESSED CONSIDERABLE SYMPATHY FOR THE US SUGGESTION THAT A DIVISION BE DRAWN BETWEEN A CLEAR, LIMITED OFFICIAL USE

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BRIEF STATEMENT OF SUBSTANTIVE PRINCIPLES, AND THE TREATMENT OF THE ADMINISTRATIVE OR OVERSIGHT MACHINERY.

10. AFTER REVIEW OF THE SECTION OF THE OECD DRAFT HAVING TO DO WITH CONFLICT OF LAWS, KIRBY NOTED THAT NO MEMBER OF DRAFTING GROUP, INCLUDING HIMSELF, WAS EXPERT ENOUGH ON CONFLICT OF LAW PRINCIPLES TO DEAL EFFECTIVELY WITH THE PROPER DRAFTING OF THIS SECTION. HE SUGGESTED THEREFORE, THAT OECD SECRETARIAT CONSIDER HIRING A RECOGNIZED LEGAL EXPERT ON CONFLICTS OF LAWS AS A CONSULTANT ON HOW CONFLICTS OF LAW PRINCIPLES ARE APPLIED TO THE NEW TECHNOLOGY WE ARE DEALING WITH, AND HE SUGGESTED THAT THE MEMBERS OF THE EXPERT GROUP SEEK THE VIEWS OF CONFLICTS OF

LAW EXPERTS IN THEIR RESPECTIVE COUNTRIES AND REPORT
THEIR COMMENTS AND VIEWS TO THE SECRETARIAT.

11. MR. KIRBY CONTINUES TO BE AN ABLE, EFFECTIVE
AND FIRM CHAIRMAN, ALTHOUGH HE IS AUSTERE AND AT TIMES TENDS
TO BE AUTHORITARIAN. HE WAS WELL ORGANIZED AND WELL
PREPARED WITH REGARD TO THE AUSTRALIAN POSITION IN
THE GUIDELINES AND HE OBVIOUSLY BROUGHT A SHARP AND
CLEAR LEGAL MIND TO HIS CONSIDERATION OF THE DRAFT
GUIDELINES. HE WAS EQUALLY WELL ORGANIZED WITH REGARD
TO CONDUCT OF THE MEETING AND DRAFTED AND CIRCULATED
ON LAST DAY OF MEETING A "STATEMENT BY THE CHAIRMAN"
WHICH SUMMARIZES CLEARLY AND COGENTLY THE DETERMINATIONS
OF THE GROUP AND THE DECISIONS FOR FUTURE ACTIONS.
INFORMAL DISCUSSIONS WITH SOME OTHER MEMBERS OF
DRAFTING GROUP REVEALED CONCURRENCE WITH US FEELINGS
THAT, THROUGH HIS FIRMNESS, KIRBY OBTAINED MORE DISCIPLINE
AND PROGRESS FROM DRAFTING GROUP THAN PREVIOUS CHAIRMEN
WOULD HAVE BEEN ABLE TO DO. ON THE WHOLE THE MEETING WAS
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CONDUCTED IN AN ATMOSPHERE OF COOPERATION AND GOODWILL
NOTWITHSTANDING DIFFERENT EMPHASIS AND APPROACHES.

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12. AFTER SOMEWHAT LENGTHY DISCUSSION, IT WAS DECIDED THAT NEXT MEETING OF DRAFTING GROUP WOULD TAKE PLACE DECEMBER 7 AND 8, IMMEDIATELY FOLLOWING A MEETING OF THE FULL EXPERT GROUP NOW SET FOR DECEMBER 5 AND 6. TIME OF NEXT MEETING WAS SUBJECT OF CONSIDERABLE DISCUSSION BETWEEN KIRBY AND OECD SECRETARIAT MEMBERS. KIRBY WAS INITIALLY INSISTENT THAT CONSULTANT SEIPEL DICTATE A REDRAFT OF THE OECD DRAFT GUIDELINES WITHIN THE NEXT FEW DAYS WHILE THE IDEAS FROM THE DRAFTING GROUP WERE STILL FRESH. SEIPEL, WHO HAS OTHER COMMITMENTS, WAS OBVIOUSLY UNHAPPY AT THE SPEED BEING PUSHED UPON HIM BY THE CHAIRMAN, WHICH LED OECD SECRETARIAT TO CHIME IN WITH REMARKS ABOUT DEMANDS ON THEIR TIME AND FACT THAT OECD DEADLINES SOMETIMES SLIP. THIS LED KIRBY TO REMARK THAT HE HAS "NO TOLERANCE" FOR DELAY. OECD LIMITED OFFICIAL USE

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SECRETARIAT WAS ADAMANT IN ITS POSITION THAT, WITH AUGUST HOLIDAYS, IT COULD NOT PRODUCE THE SEIPEL REDRAFT AND OTHER TASKS LEVIED ON IT BY OCTOBER (WHEN ANOTHER DRAFTING GROUP MEETING WAS ORIGINALLY SCHEDULED) AND TOLD KIRBY HE SHOULD NOT IMPOSE TIME CONSTRAINTS ON THE SECRETARIAT. KIRBY, ON OTHER HAND, FOUND IT TOTALLY UNACCEPTABLE THAT, WITHOUT A SECOND DRAFTING SESSION IN OCTOBER TO WORK OVER THE SEIPEL REDRAFT, THE DECEMBER MEETING OF THE FULL EXPERT GROUP WOULD END UP WITH NO PAPER TO CONSIDER. COMPROMISE WAS STRUCK BY SUGGESTION OF AUSTRIAN DELEGATE, DOCTOR STADLER, THAT NEXT MEETING OF DRAFTING GROUP BE IMMEDIATELY AFTER THE DECEMBER EXPERT GROUP MEETING, WHICH WILL ALLOW TIME FOR PRODUCTION OF SEIPEL REDRAFT WHICH CAN BE CIRCULATED TO THE FULL EXPERT GROUP FOR ITS VIEWS, WHICH WILL BE TAKEN INTO CONSIDERATION BY DRAFTING GROUP AT ITS SESSION IMMEDIATELY FOLLOWING. THIS EXCHANGE IS ELABORATED BY US DEL IN ATTEMPT TO GIVE ADDRESSES SOME FEEL FOR THE FIRMNESS AND NO NONSENSE ATTITUDE OF THE CHAIRMAN AND HIS STRONG FEELING THAT GROUP SHOULD MEET ITS JUNE 1979 DEADLINE.

13. FROM TONE AND CONTENT OF MEETING, US DEL BELIEVES IT WOULD MATERIALLY ASSIST US IN PROMOTING ITS OWN POINT OF VIEW TO EXPOSE EUROPEAN PRIVACY PROTECTION POLICY-MAKERS TO SOME INTENSIVE BRIEFINGS ON US PRIVACY LAW AND

POLICY. IT APPEARS THAT IN GENERAL THEY LACK AN ADEQUATE COMPREHENSION OF THE EXISTING US LAWS, AND INDEED OF THE FUNDAMENTAL NATURE OF AMERICAN JURISPRUDENCE. A BETTER UNDERSTANDING OF THESE MATTERS COULD ALLEVIATE SOME RESISTANCE TO US PREFERENCES IN DRAFTING OF GUIDELINES AND COULD HELP PROTECT US INTERESTS IN SUBSEQUENT ADMINISTRATION OF EUROPEAN DATA EXPORT LIMITING LAWS. AN LIMITED OFFICIAL USE

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APPROPRIATE CONTEXT AND TIMING FOR SUCH A BRIEFING WARRANTS CAREFUL THOUGHT.
KENNEDY-MINOTT

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